Headnote

to the Judgment of the First Senate of 30 January 2002

– 1 BvL 23/96 –

Decision regarding the constitutionality of the exclusion of double family names

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 23/96 –

Pronounced
on 30 January 2002
Achilles
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings for constitutional review

of § 1616 (2) sentence 1 and (3) of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in the version of the Act Reforming the Law on Family Names (Law on Family Names Act, *Familiennamenrechtsgesetz* – FamNamRG) of 16 December 1993 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2054)

– order of suspension and referral from the Hamburg Local Court (*Amtsgericht*) of 6 September 1996 (107 X B 13/95) -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice President Papier,

Jaeger,

Haas,

Hömig,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde

held on the basis of the oral hearing of 6 November 2001:

Judgment :

§ 1616.2 sentence 1 of the Civil Code in the version of the Act Reforming the Law on Family Names of 16 December 1993 (BGBl I p. 2054) and § 1617.1 sentence 1 of the Civil Code in the version of the Act Reforming the Law of Parent and Child (Law of Parent and Child Reform Act, *Kindschaftsrechtsreformgesetz* – KindRG) of 16 December 1997 (BGBl I p. 2942) are compatible with the Basic Law (*Grundgesetz* – GG).

Reasons:

A.

The submission relates to the question of whether it is compatible with the Basic Law that parents with joint custody who do not use a married name may designate as the birth name of their child only either the name of the father or that of the mother, but not a double name consisting of both of their names together. Over and above this, the submission raises the question as to whether the statutory empowerment of the competent court to assign to one parent the right to designate should the parents fail to designate a birth name, with the consequence that the child receives the name of this parent if they persist in not designating a name, is constitutional. 1

I.

1. According to § 1616 of the Civil Code in the original version of 18 August 1896 (Reich Law Gazette, *Reichsgesetzblatt* – RGBl p. 195), the birth name of the child born in wedlock followed the name of the father, which on the basis of the conclusion of marriage was at the same time also the name of the mother as joint family name (married name). With the First Act Reforming the Law on Marriage and Family (*Erstes Gesetz zur Reform des Ehe- und Familienrechts* – 1. EheRG) of 14 June 1976 (BGBl I p. 1421), spouses were given the right to select either the birth name of the husband or of the wife as the married name. Were the spouses to fail to designate a name, the name of the husband became the married name (§ 1355.2 sentence 2 of BGB in the version of the First Act Reforming the Law on Marriage and Family). A child born in wedlock received the joint family name, in other words the married name of the parents, as birth name according to § 1616 of the Civil Code. 2

2. By order of 5 March 1991 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 84, 9), the Federal Constitutional Court ruled that § 1355.2 sentence 2 of the Civil Code was incompatible with Article 3.2 of the Basic Law, and adopted a transitional provision until the entry into force of a new statutory provision for cases in which the spouses did not designate a name according to § 1355.2 sentence 1 of the Civil Code. Accordingly, the spouses were initially to retain the name which they had had prior to the conclusion of marriage. This made it necessary in this respect to also make a temporary provision 3

for the child's name. On the basis of the principle of the possibility of a choice between the father's name and the mother's name, as well as the requirement of selecting a solution – taking account of the latitude available to the legislature – which encroached as little as possible on the rights of those concerned and which did not make the legal reform difficult, the Federal Constitutional Court expanded the option open to the parents such that they could also choose for the child as birth name a double name combined from the name of his or her parents (BVerfG, loc. cit., p. 24). Here, in the case of a conflict the registrar was to determine the sequence of the names by drawing lots. The broad latitude for the legislature in reforming the law on names was to comprise the option that it could opt on the one hand to retain the uniform family name with a gender-neutral default regulation, whilst on the other hand also permitting exceptions from the principle of uniform names, or could provide for a completely new law on married names (BVerfG, loc. cit., p. 21).

3. With the Act Reforming the Law on Family Names – Law on Family Names Act of 16 December 1993 (BGBl I p. 2054), which entered into force on 1 April 1994, both the law on married names and that on birth names was thereupon reformed. Whilst however the draft Bill of the Federal Government (*Bundestag* printed paper, *Bundestagsdrucksache – BTDrucks* 12/3163) had still provided for the selection of a double married name or that of a double name as the child's birth name, this met with reservations in the *Bundestag*. The parliamentary groups of the CDU/CSU and of the FDP agreed on the exclusion of double names and on a regulation in the event of the parents not agreeing on the child's name, on the basis of which the Committee on Legal Affairs of the *Bundestag* proposed an amendment of the draft Bill which was adopted in this form by the *Bundestag* and which found the consent of the Bundesrat. 4

In its recommendation for a resolution, the Committee on Legal Affairs provided reasoning for the exclusion of double names by stating that it was necessary to prevent the name structure in Germany undergoing a fundamental change after only several generations had passed because double married names were assigned to children born in wedlock as birth names (see BTDrucks 12/5982, p. 18). A solution entailing double and multiple names was said to be absolutely contingent on limiting the number of names, and hence as a consequence two spouses could no longer bring their double name into the next generation, but only a part of it, and hence not really their own names (see BTDrucks 12/5982, p. 17). 5

The spouses were however granted the possibility for the first time not to designate a married name according to § 1355.1 of the Civil Code, in addition to the selection of the name of the husband or of the wife as married name. Where parents had a married name, according to § 1616.1 of the Civil Code the child continued to receive the married name of his or her parents as birth name. For parents without a married name, the selection of the birth name for their child was restricted to the name of the father or to the name of the mother. If the parents did not designate a name, the guardianship court was charged with transferring the right of designation to one parent. 6

§ 1616 of the Civil Code was worded as follows: 7

> (1) A child born in wedlock shall receive the married name of his or her parents as a birth name. 8
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> (2) If the parents do not have a family name, they shall designate by declaration to the registrar the name that the father or the mother has at the time of the declaration as the birth name of the child. The declaration must be notarially certified. The designation made by the parents shall also apply to their further children. 9
>
> (3) If the parents do not make a designation within one month after the birth of the child, the guardianship court shall transfer the right of designation to one parent. Subsection 2 shall apply mutatis mutandis. The guardianship court may impose a period of time on the parent for the exercise of the right of designation. If the right of designation has not been exercised after the period has ended, the child shall receive the name of the parent to whom the right of designation was transferred. 10
>
> (4) (…) 11

Additionally, the guardianship court was obliged in § 46a of the Act on Matters of Non-contentious Jurisdiction (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*) to hear both parents prior to taking a decision according to § 1616.3 of the Civil Code and to strive to bring about an agreement as to the child's name. It was further provided that the ruling of the guardianship court does not require reasoning and is unappealable. 12

4. The distinction between children born in and out of wedlock under the law on names was also abolished for reasons of equal treatment by the Act Reforming the Law of Parent and Child (Law of Parent and Child Reform Act) of 16 December 1997 (BGBl I p. 2942), which entered into force on 1 July 1998. Independently of whether the child was born in or out of wedlock, the right to designate the birth name of a child is now linked to the joint right of custody of the parents or to the sole custody of one parent. The new arrangement has changed the order of the sections and has given to the family court, instead of to the guardianship court, jurisdiction for the transfer of the right to designate the birth name of the child. § 1616 of the Civil Code contains in this respect solely the principle that the child receives the married name of his or her parents as birth name. 13

Subsections 1 and 2 of § 1617 of the Civil Code, which are now material to the selection of the birth name for a child of parents who do not have a married name, read as follows: 14

> (1) If the parents do not have a family name, and if they have joint parental custody, they shall designate by declaration to the registrar 15

the name that the father or the mother has at the time of the declaration as the birth name of the child. A declaration made after the recording of the birth must be notarially certified. The designation made by the parents shall also apply to their further children.

(2) If the parents do not make a designation within one month after the birth of the child, the family court shall transfer the right of designation to one parent. Subsection 1 shall apply *mutatis mutandis*. The guardianship court may impose a period of time on the parent for the exercise of the right of designation. If the right of designation has not been exercised after the period has ended, the child shall receive the name of the parent to whom the right of designation was transferred. 16

5. The birth name of the child was also determined according to the married name of the parents according to the Family Code (*Familiengesetzbuch*) of the German Democratic Republic of 20 December 1965 (Law Gazette, *Gesetzblatt* – GBl 1966 I p. 1). If they were not married, the child received the name of his or her mother (§ 64.1 and 2 of the Family Code). The spouses were able to select as their joint married name the name of the husband or of the wife (§ 7.1 of the Family Code); they had to submit a declaration to this effect prior to conclusion of marriage. This was an absolute precondition for the conclusion of marriage. 17

II.

1. The parents involved in the original proceedings do not have a married name, and did not designate a birth name according to § 1616.2 of the Civil Code in the version of the Law on Family Names Act (hereinafter: § 1616.2 of the Civil Code, old version) for their child, who was born in 1995. They agree in wishing their child to receive a double name as a birth name consisting of the name of the father and of the mother. The registry office informed the guardianship court of this, which had jurisdiction for this according to the law applicable at the time, which was now obliged according to § 1616.3 of the Civil Code, old version, to transfer the right of name designation to one parent. 18

2. The guardianship court suspended the proceedings according to Article 100.1 of the Basic Law and submitted the question to the Federal Constitutional Court as to whether § 1616 subsections 2 and 3 of the Civil Code, old version, is constitutional. The right provided for in § 1616.3 of the Civil Code, old version, for the guardianship court to determine the name is said to conflict with the parents' right as protected by fundamental rights under Article 6.1 and 6.2 of the Basic Law. Over and above this, the prohibition to give a double name regulated in § 1616.2 of the Civil Code, old version, for a child whose parents did not have a married name is alleged to be incompatible with the constitutional guarantees from Article 2.1 in conjunction with Article 1.1 of the Basic Law and from Article 6.1 and 6.2 of the Basic Law. 19

[…] 20-23

III.

[…] 24-32

B.

I.

The submission is admissible insofar as it submits the question of the constitutionality of § 1616.2 sentence 1 of the Civil Code, old version. 33

[…] 34-38

II.

The review of the submitted question as to the constitutionality of § 1616.2 sentence 1 of the Civil Code, old version, is to cover § 1617.1 sentence 1 of the Civil Code in the version of the Law of Parent and Child Reform Act (hereinafter: § 1617.1 sentence 1 of the Civil Code). This provision has replaced § 1616.2 sentence 1 of the Civil Code, old version, since 1 July 1998. Since it too restricts the right of parents who have joint custody but no married name to designate the child's birth name to the name of the father or of the mother, and in this respect rules out the child having a double name, it is necessary to include this new provision in the constitutional review (see BVerfGE 28, 324 (363); 61, 291 (306); 65, 237 (243-244)). 39

C.

§ 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code are compatible with the Basic Law. 40

I.

The exclusion of the child's double name does not violate the parental right protected by Article 6.2 of the Basic Law. 41

1. As a more specific provision in comparison with Article 6.1 of the Basic Law, which obliges the state to respect and promote the unity and self-responsibility of marriage and the family (see BVerfGE 53, 257 (296)), and in doing so to forgo encroachments on the free arrangement of family co-habitation, Article 6.2 of the Basic Law protects the parent-child relationship and ensures that parents have the right to care for and bring up their children (see BVerfGE 31, 194 (204)). This freedom right guaranteed to parents by the constitution as against the state primarily serves the child's best interests, which at the same time is the highest guiding principle for the exercise of parents' responsibility (see BVerfGE 61, 358 (371-372); 75, 201 (218)). The right of the parents to care for their child also includes the right to give their child a name. 42

2. The name of a person is an expression of his or her identity and individuality and accompanies the life story of its bearer, which becomes recognisable under this name as a continuing one (see BVerfGE 78, 38 (49); 84, 9 (22); 97, 391 (399)). It helps the growing child to find his or her identity and express it towards others. Naming is to open for the child the opportunity for the development of his or her personality and to serve his or her best interests, the maintenance of which is entrusted to the parents as both a right and a duty in equal measure. Naming includes the selection of the name. The decision as to which name he or she is to bear is also significant for the child, given that he or she lives from now on with the name designated for him or her and is identified with it. Determining it in exercising the responsibility for the child is a part of the parental right emanating from Article 6.2 of the Basic Law. 43

a) This applies first and foremost to the selection of a forename for the child, which exclusively lends expression to the individuality of a person, designates the individual and distinguishes him or her from others. It is the primary task of the parents to determine for their child in a free, joint choice a name which he or she cannot yet give himself or herself. A limit may be set on this right of the parents to select a forename for their child solely where its exercise risks impairing the child's best interests (see BVerfGE 24, 119 (143)). In exercising its watchdog function, the state is not only entitled but is indeed obliged, according to Article 6.2 sentence 2 of the Basic Law, to protect the child as a subject of fundamental rights against irresponsible selection of names on the part of the parents. Article 6.2 of the Basic Law does not offer a basis for an encroachment on the parental right to designate the forename for their child over and above this. 44

b) Added to this is the selection of the birth name as the family name of the child insofar as the legal order provides for the bearing of a family name and provides an option therefor. 45

Constituting and giving concrete form to the law on family names is a matter for the legislature (see BVerfGE 78, 38 (49)). The function of the family name need not be restricted solely to providing the individual with an expression of his or her individuality. Rather, the family name can also be used to trace lines of descent, to portray family ties or to clarify the family status of an individual. The function of the family name is expressed for instance in its designation as a birth name or married name. 46

If the family name is to carry out functions of allocating its name-bearer within a community, its selection may not remain a matter solely for the free decision of the individual, but there is a need for rules according to which it can be allocated or selected, also taking account of the interests of the public. The goals pursued by the legislature in shaping the law on family names must conform to the value principles of the constitution and to the fundamental rights of those affected by it, and must promote the function of the family name. 47

3. By virtue of § 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code, the legislature has excluded the selection of a double name 48

formed from the name of the parents as a birth name for the child in a constitutionally unobjectionable manner in the context of drafting the law on family names.

a) The family attribution to his or her parents via the birth name of the child is orientated in a permissible manner in line with the valuation of Article 6.1 of the Basic Law to protect marriage and the family in their unity as a community. 49

In order to be able to express in the name the fact of the child belonging with his or her parents, the legislature may provide for the child's name to be derived from the parental name. The structure of the law on birth names is hence predetermined by the design of the law on names of the parents. Their possibility of using and choosing a name sets the framework within which the birth name of the child can be designated. The right of the parents to designate the birth name of their child under Article 6.2 of the Basic Law is hence to be considered in the light of the entire structure of the law on names and the fundamental rights to be protected in its design. 50

b) The right of the parents as to their own naming is vital first of all here. 51

aa) In shaping the law on spouses' names, the legislature must respect the protection of the name that is used, which is covered by the law on the personality of the name-bearer under Article 2.1 in conjunction with Article 1.1 of the Basic Law (see BVerfGE 78, 38 (49)). A name change may hence only be required by the legislature for an important reason. It is therefore not constitutionally objectionable that the legislature continues to provide in § 1355.1 of the Civil Code for spouses to use a married name as a standard in order to lend expression to the unity of the family in the joint name. This requires one of the spouses to change their name on conclusion of marriage. However, holding a uniform family name in marriage is not constitutionally required since the family unity protected by Article 6.1 of the Basic Law is borne and lived by its individual members, who in turn receive from Article 6.1 of the Basic Law protection and space for freedom. 52

In addition to the protection of the name as used, the legislature must also respect the principle of equal treatment under Article 3.2 sentence 1 of the Basic Law, which prohibits for the law on names to grant priority to the husband's name on forming a joint family name or passing on a name to a child (see BVerfGE 48, 327 (337-338); 84, 9 (17-18)). Finally, the legislature must at the same time ensure that the law on names does not disproportionately restrict the freedom available for selecting the name granted by Article 2.1 of the Basic Law, as well as by Article 6.1 of the Basic Law. 53

bb) These constitutional preconditions for the law on names are met by the law on married names now applicable forming the connection for the law on the birth name of the child. 54

(1) § 1355.1 of the Civil Code opens to spouses the possibility to have a married name. Neither of the names previously used by the spouses is granted priority in the selection of the joint name. If the spouses do not agree on a married name, or if they 55

do not wish to use one, they continue to use their previous names. Hence, the legislature has lent particular expression to the protection of the name used from Article 2.1 of the Basic Law as an expression of the personality of each individual spouse.

(2) The fact that the legislature has ruled out according to § 1355.2 of the Civil Code the selection of a double name as a married name does not violate the spouses' fundamental rights. The need of spouses to be able to express the mutual bond and identity in the new commonality in the name is adequately taken account of by the possibility to select one of their birth names as a married name. The legislature complied with the desire to be able to also express, in addition to the new joint identity, the identity communicated via the previously held name in the joint name by virtue of the fact that it granted to the spouse whose name is not selected as the married name the right to add their previously used name to the married name. For the spouse whose name is designated as the married name, by contrast, this name expresses both his or her previous individual identity and his or her new identity in the commonality, given that it is his or her own name and at the same time the one which his or her spouse now also uses as a name. The right of personality of the spouses is hence accommodated. 56

cc) The fact of the family name in principle containing one single element, as prescribed by the legislature, which does not permit spouses to have a married name made up of both of their names, is based on considerations which are constitutionally unobjectionable. The legislature has given consideration here to the consequences which may emerge from the formation of double names as the generations pass. If spouses are granted in general terms the right to combine their two previous names to form the married name, and if furthermore the married name is in principle to become the birth name of the child born in wedlock in order to express his or her belonging to the family, four-fold name chains may already be formed in the next generation as married names which would further potentiate on conclusion of marriage, transferred to the children in each case from one generation to the next. The fact that the legislature intends to avoid such multi-element name chains (see BTDrucks 12/5982, p. 17) can be reasoned not only with considerations of practicability, but also serves to protect future name-bearers. Hence, with the increase in the number of names, the function of the name to create an identity in being the point of reference for the bearer of the name is at risk of being lost. Particularly because of this function, however, the name receives constitutional protection. If the legislature attempts to prevent such a development for the name structure by virtue of not limiting the combination of names only for following generations, but from the outset opens to spouses alone the possibility in principle to only designate one of their names as a married name, this is the result of a consideration which complies with the constitution. Authorisation of a double married name would be equally constitutional, but it is not required. 57

c) The possibility for the spouses to opt between retention of their names and holding a joint name creates different preconditions in each case for a link between the child's birth name and the parental name to identify family affiliation: If the parents 58

have a joint name, or if only one parent has custody for a child, only one name is available for the birth name of the child. By contrast, if married or unmarried parents who have custody use different names for the designation of the child's name, this leads to selection between the respective names of the parents and a combination of both parents' names. One of these possibilities is the double name consisting of the parents' names as the birth name for the child. This has however been ruled out by the legislature. Taking such a path is constitutionally unobjectionable.

aa) This restriction of the parental option is however not factually reasoned in the function which the legislature has allotted to family names in general, and hence also to the birth name. The double name combined from the names of the parents may indeed better express the family affiliation of the child than a birth name selected from among the two names, given that it documents by means of the name the fact of the child being tied to both parents. 59

bb) The possibility of parents to link their names to become a double name, and hence to pass them on to their children, however leads to practical difficulties if they have more than one name each. If they themselves have double names, the right to combine both parents' names in forming the birth name of the child would lead here to a multiple-element name chain which could become longer from one generation to the next. The legislature is not prevented from taking precautions under the law on names in order to avoid such name chains if it wishes to ensure viable family names for future generations and to guarantee the protection of the name that is used. 60

cc) The development of name chains could however be countered not only by exclusion of a double name for a child. It would also be possible to generally limit the number of names which may be combined to the formation of double names in designating a child's birth name. This would however in turn restrict the possibility of parents with a double name to also claim for themselves the right to completely document both parents' names in the child's name. Furthermore, for persons who have received a double name as a birth name the choice of names would at the same time have to be restricted on conclusion of marriage. In order to prevent name chains over and above double names, they would not only have to be denied the complete combination of both of their names if they wished to have a married name, but they would also have to be prohibited from adding their complete own names to the married name selected. They would hence at least have to do without one part of their previous double name. This would deprive them of what § 1355 of the Civil Code enables name-bearers with one name: Retention of their own name whilst selecting a married name deviating from this. The expansion of parents' options to include the double name as a birth name for their child hence leads to a restriction of the possibilities to select names for bearers of double names themselves. If however the realisation of one fundamental right at the same time leads to the restriction of others, a suitable balance must be struck between the fundamental rights in question. 61

d) The legislature complied with these requirements by excluding the selection of a 62

double name for a child in pursuance of its goals borne by Article 6.1 of the Basic Law and Article 2.1 of the Basic Law. By linking the child's name to the joint parents' name or to the name of one parent, the legislature intended to lend expression to the child's family affiliation. At the same time, with the exclusion of the double name it prevented name chains being formed as the generations pass. By these means, it intended to ensure the function of the name to create a personal identity. That it did so by restricting the right to determine the name of the current generation of parents, and not by restricting the following parents' generations, is not required as a legislative decision in terms of constitutionality, taking account of the options still open to parents in determining their own name and the child's name, but it is also not objectionable. It leaves the conflicting fundamental rights a sufficient degree of realisation and leads to a law on family names which is supportive of the legislative goals.

II.

The exclusion of a double name for a child violates neither the right of personality of the child, nor that of the parents under Article 2.1 in conjunction with Article 1.1 of the Basic Law. 63

1. Not being able to receive as a birth name a double name consisting of the parents' names does not violate the child's right of personality. 64

The child's own right to develop his or her personality (see BVerfGE 24, 119 (144); 72, 155 (172); 79, 51 (63)) includes protection of his or her name. It helps him or her to find his or her identity and to develop individuality. Without a name, the child will find it difficult to develop his or her own personality and to build up a relationship with others. Therefore, the right to receive a name is also covered by the child's right of personality as a major precondition for the development of his or her personality. This relates to the forename and to family names. If the legal order provides for family names to be used, this name is the means with the aid of which the child learns to enter into relationships with others. 65

Having said that, the child's right of personality does not include a right to personal choice of the birth name. If the birth name of the child is to comply with its function of contributing towards the personality development of the child, the child must receive it shortly after birth, in other words at a time when he or she is not yet able to give himself or herself a name. What is more, it is vital for his or her search for an identity that the child receives a name, but not what specific name he or she receives. It is only the self-perception via a name which leads to identification with it as a means to form an identity of his or her own. 66

2. The exclusion of a double name for a child also does not impact on the right of personality of the parents as protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law. 67

The wish to give one's offspring one's own name for life may be a human need. The parents' right of personality does, however, not establish a right to compliance with 68

this need. Only one's own identity and personality are covered by protection of personality. Article 2.1 of the Basic Law does not provide a right of determination regarding another person (see BVerfGE 24, 119 (144); 72, 155 (172)). This also applies to parents in relation to their children. The right to give their children a name is granted to parents in fundamental-rights terms not in the interest of their own personality development, but solely in the interest of their children, in the framework of their responsibility as holders of custody according to Article 6.2 of the Basic Law.

III.

1. § 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code violate neither Article 3.3 sentence 1 of the Basic Law, nor the principle of equal rights contained in Article 3.2 of the Basic Law. 69

a) According to Article 3.3 sentence 1 of the Basic Law, no one may be disadvantaged or favoured because of his sex. Sex may in principle not be used as an indication for legal different treatment. A link to sex may also apply if a provision the wording of which is gender-neutral ultimately largely concerns members of one sex, for instance women, and this is the result of natural or social differences between the sexes (see BVerfGE 97, 35 (43)). Article 3.2 of the Basic Law requires over and above this not only to eliminate legal norms which link advantages or disadvantages to sexual characteristics, but is aimed at approximating the situations in life of men and women (see BVerfGE 85, 191 (207)). This is made explicitly clear in sentence 2 of Article 3.2 of the Basic Law (see BVerfGE 92, 91 (109)). The consequence of this for the parental right to designate names is that both parents are equally entitled to designate the name of their child, and no parent may be awarded priority in the possibility of passing on their own name to the child. 70

b) These requirements are met by § 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code. Accordingly, it is left to the free decision of the parents as to which of their own names is designated as the child's name. That they are to agree on one name and cannot over and above this give the child a name combined from both of their names does restrict the choices available to them. This however affects mothers and fathers in equal measure. 71

Also the fact that the vast majority of married parents still have a married name which has been determined by the husband's name, and that parents who do not have a married name, but use their own names, also to a very great degree opt for the name of the husband as the birth name of the child when making a selection according to § 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code, so that only a small number of children receive the name of their mother as a birth name (according to a dpa survey among registry offices, see *Frankfurter Rundschau* no. 62 of 14 March 2001), does not permit the conclusion to be drawn that the provisions provide equal law, but do not take account of a differing starting position of mothers and fathers in determining their child's name. 72

The fact that, in selecting the birth name of their child, spouses still largely opt for the name of the husband may be an expression of a traditional understanding of roles and indicate that no equal partnership in this respect in fact exists as yet when it comes to the free decision taken by spouses on their own responsibility regarding the structure of their relationship *inter se* and with their children, as well as on the distribution of tasks in the marriage, protected by Article 6.1 of the Basic Law (see BVerfGE 66, 84 (94)). However, the mandate of Article 3.2 of the Basic Law to promote the de facto implementation of equal rights of women and men, and to work towards the elimination of existing disadvantages, does not lead to a constitutional requirement to enable parents to select a double name for their children. 73

Insofar as can be seen, a priority selection of the husband's name as the name of the child is largely not based on a disadvantaged situation of women, but on pre-existing attitudes. With the possibility open to parents to select as the name of their child both the name of the father and that of the mother, space has now also been created in terms of the law on names for a change in such attitudes. The change in attitudes thus facilitated is not considerably promoted by virtue of the ability to give children not only the name of the mother as a birth name, but instead also a name combined from the name of the father and the mother. The possibility of also giving to the child a double name combined from both parents' names could help to avoid a conflict between the parents regarding the child's name, whilst at the same time leading to a situation in which more children also bear that of the mother as a part of their name. This could lead the legislature to amend the law on names, but is not required by Article 3.2 of the Basic Law. Such a provision would already lose at least its full effect in the next generation if, in order to avoid name chains, one part of the parents' name had to be removed once again in the determination of the child's name. In view of the at best slight impact on the implementation of Article 3.2 of the Basic Law, the legislature was permitted to pursue its goal of avoiding double names by virtue of the provision as created. 74

2. Article 3.1 of the Basic Law is not violated because whilst the formation of a double name is ruled out as a birth name for a child, a child may have a double name in exceptional cases. There are sufficient factual reasons for this. 75

a) If parents may also designate a double name held by one parent according to § 1616.2 sentence 1 of the Civil Code, old version, and § 1617.1 sentence 1 of the Civil Code as the birth name of the child, authorisation of this double name for the child does not signify unequal treatment compared to parents who do not have double names. In both cases, only the name of one parent may be selected as the child's birth name. 76

b) If a child who lives in a new family community after the separation of his or her parents with the re-married parent who has custody may receive a double name by virtue of the fact that the new married name of his or her parent who has custody may be prefixed or suffixed to his or her previously held name for his or her name change 77

according to § 1618 sentence 2 of the Civil Code, this does not constitute any unconstitutional unequal treatment in relation to parents who are unable to give their child a double name as a birth name. Also with double names resulting from such name changes, only one name, namely the one which was previously held by the child, refers to his or her descent from his or her parents. The fact that the child may retain this name serves the protection of personality of the child who has already become identified with his or her previously held name. Additionally, he or she is to be enabled by adding the new married name of his or her parent with custody to also lend expression to his or her new social affiliation in the name. The function of the authorisation of the double name thus formed is to document both the descent and his or her social affiliation in the name of the child, even if the family situation of the child no longer shows both attributions. If, in contrast, parents who have joint custody designate the birth name of their child, there is no need to label the physical and simultaneously social affiliation of the child by means of two names and their conjunction to form a double name because both affiliations are unified in the family in which the child lives.

The same factual reasons also justify on adoption of a child to be able to give him or her a double name according to § 1757.4 sentence 1 no. 2 of the Civil Code in the context of the name change which consists of the previous name of the child and of the family name of his or her adoptive parents. 78

c) Finally, it is also factually justified and does not violate Article 3.1 of the Basic Law that siblings of children who received a double name from 5 March 1991 until 31 March 1994 on the basis of the ruling of the Federal Constitutional Court are also granted this double name as a birth name according to Article 224 § 3.3 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB). This transitional regulation serves to maintain a common name among siblings also in families in which the first born was given a double name in a legally permissible manner, and at the same time the name protection of the first born from Article 2.1 of the Basic Law. 79

D.

This decision was rendered with 6:2 votes re C. I., and in other respects unanimously. 80

Papier	Jaeger	Haas
Hömig	Steiner	Hohmann-Dennhardt
Hoffmann-Riem		Bryde

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